

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA

AARON DAVIS,	)	No. CV-F-05-271 OWW/DLB
	)	
	)	ORDER GRANTING DEFENDANTS'
Plaintiff,	)	MOTION TO STRIKE AMENDED
	)	COMPLAINT (Doc. 35) AND
vs.	)	STRIKING THIRD AMENDED
	)	COMPLAINT (Doc. 34)
	)	
FOSTER FARMS DAIRY, et al.,	)	
	)	
	)	
Defendant.	)	
	)	
	)	

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On November 13, 2006, Plaintiff Aaron Davis, proceeding *in pro per*, filed an "Amended Complaint with Supplemental Facts". (Doc. 34).

Defendants move to strike this Amended Complaint pursuant to Rule 12(f), Federal Rules of Civil Procedure, because Plaintiff failed to obtain permission to file the Amended Complaint as required by Rule 15(a), Federal Rules of Civil Procedure.

Plaintiff, who appeared at the hearing, did not file a written opposition to the motion to strike. Rule 78-230(c), Local Rules of Practice, provides in pertinent part:

1 Opposition, if any, to the granting of the  
2 motion shall be in writing and shall be filed  
3 with the Clerk not less than fourteen (14)  
4 days preceding the noticed (or continued)  
5 hearing date. Opposition shall be [served]  
6 on opposing counsel not less than fourteen  
7 (14) days preceding the hearing date  
8 (personal service) or mailed or electronic  
9 served not less than seventeen (17) days  
10 preceding the hearing date. A responding  
11 party who has no opposition to the granting  
12 of the motion shall serve and file a  
13 statement to that effect, specifically  
14 designating the motion in question. No party  
15 will be entitled to be heard in opposition to  
16 a motion at oral argument if opposition to  
17 the motion has not been timely served by that  
18 party.

19 Initially, Plaintiff was one of a trio of plaintiffs who  
20 brought an action against Defendants in No. CV-F-04-6634 REC/DLB.  
21 By Order filed on February 24, 2005, Plaintiff's claims were  
22 severed and Plaintiff was directed to file an Amended Complaint  
23 in a separate civil action. After receiving an extension of  
24 time, Plaintiff filed the Amended Complaint (hereinafter referred  
25 to as the First Amended Complaint or FAC) commencing this action  
26 on June 15, 2005.<sup>1</sup> Defendants filed an Answer to the FAC on  
April 17, 2006. A scheduling conference was held on October 20,  
2006. Pursuant to the Scheduling Order filed on October 23,  
2006, "[t]he parties do not anticipate filing any amendments to  
the pleadings at this time." However, on October 25, 2006,  
Plaintiff filed a motion for an extension of time to submit

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<sup>1</sup>Plaintiff filed an Amended Complaint on February 24, 2005,  
giving it the case number No. CV-F-04-6634 REC/DLB. Because this  
pleading was filed on the same day as the Order severing  
Plaintiff's claims, it is disregarded for purposes of this motion.

1 "supplemental facts". On October 27, 2006, Plaintiff filed a  
2 "Second Amended Complaint for Damages and To Turn in Supplemental  
3 Facts" (hereinafter referred to as the Second Amended Complaint  
4 or SAC) without first having obtained leave of court to do so.  
5 Defendants filed an Answer to the SAC on November 13, 2006. Also  
6 on November 13, 2006, Plaintiff filed an "Amended Complaint with  
7 Supplemental Facts" (hereafter referred to as the Third Amended  
8 Complaint or TAC) without first obtaining leave of court.

9 Rule 15(a) provides in pertinent part:

10 A party may amend the party's pleading once  
11 as a matter of course at any time before a  
12 responsive pleading is served... Otherwise a  
13 party may amend the party's pleading only by  
leave of court or by written consent of the  
adverse party; and leave shall be freely  
given when justice so requires.

14 As explained in Wright, Miller & Kane, Federal Practice and  
15 Procedure: Civil 2d § 1484 at pp. 601-602:

16 In general, if an amendment that cannot be  
17 made as of right is served without obtaining  
the court's leave or the opposing party's  
18 consent, it is without legal effect and any  
new matter it contains will not be considered  
19 unless the amendment is resubmitted for the  
court's approval. However, some courts have  
20 held that an untimely amended pleading served  
without judicial permission may be considered  
21 as properly introduced when leave to amend  
would have been granted had it been sought  
22 and when it does not appear that any of the  
parties will be prejudiced by allowing the  
change. Permitting an amendment without  
23 formal application to the court under these  
circumstances is in keeping with the overall  
24 liberal policy of Rule 15(a) and the general  
desirability of minimizing needless  
25 formalities. On the other hand, a more  
restrictive attitude toward the failure of a  
26 party to proceed in the manner prescribed by

1           the rule could be justified if it becomes  
2           necessary to discourage litigants from  
3           totally disregarding the requirements of  
4           subdivision (a).

5           In the Amended Complaint filed on June 15, 2005, Plaintiff  
6           names as defendants Foster Farms Dairy, David Bettancourt, Plant  
7           Manager for Foster Farms Dairy, and Ron Foster, owner of Foster  
8           Farms Dairy. The Amended Complaint alleges that it is brought  
9           for employment discrimination in violation of Title VII. The  
10          Amended Complaint alleges that Plaintiff's employment was  
11          terminated in February 2005 "after he was subpoenaed for a  
12          deposition regarding a Foster Farms which involved discriminatory  
13          action(s) against African Americans and where Plaintiff was under  
14          oath and disclosed the discriminatory action(s) of Foster Farms  
15          and 28 other related issues that Foster Farms did not want  
16          disclosed" [sic]; that Defendants' "employment practice or  
17          policies ... has had a discriminatory effect or impact upon him  
18          for the last fifteen years"; that Defendants "refusal to promote  
19          African Americans and loss of employment-related opportunities  
20          constitute [sic] a disparate treatment in that it was based on  
21          the fact that plaintiff was terminated for his support of African  
22          American rights"; that Plaintiff "bases this conclusion on the  
23          fact that defendants continued to seek applicants  
24          (White/Caucasian) for either management positions or employment  
25          opportunities"; and that during his employment at Foster Farms  
26          Dairy "he was subject to racial comments, epithets and slurs at  
          the workplace including, but not limited to the following:

1 'NIGGER LOVER' and 'Fuck You Tanto'." The Second Cause of Action  
2 is captioned "Director's and Supervisors Liability" and alleges  
3 that Defendants "were at all times on notice of the acts (or  
4 should have been on notice) of racial discrimination and bigotry  
5 toward African American race and his friends national origin but  
6 failed to take appropriate steps to terminate these defendants,  
7 and DOES 1 through 10, inclusive, who engaged in such  
8 discriminatory acts", and that Defendants thereby ratified and  
9 affirmed such discriminatory conduct. The Third Cause of Action  
10 is for intentional infliction of emotional distress. The Fourth  
11 Cause of Action is for Injunctive Relief, alleging that "[u]nless  
12 restrained and enjoined from the racially motivated  
13 discrimination described in the preceding paragraphs of this  
14 pleading and compelled to appear and show cause why they should  
15 not be disqualified from participation in all federal, state and  
16 local programs, defendants ... will continue to engage in racial  
17 discrimination in employment in violation of law, and plaintiff  
18 will continue to suffer irreparable injury." The Fourth Cause of  
19 Action prays for a "Preliminary and Permanent Injunction and  
20 Order to Show Cause":

21 a) For Order prohibiting defendants ... and  
22 every person or business entity that employs  
23 or is owned or controlled by any defendant(s)  
24 with knowledge of the Court's Order from  
25 engaging in any act of discrimination in  
26 employment based on race, national origin,  
age, gender or gender preference that is  
prohibited by law; and

b) For Order requiring defendants ... and  
every person or business entity that employs

1 or that is owned or controlled by any  
2 defendant(s) with knowledge of the Court's  
3 Order to hire or promote qualified persons of  
4 female, Afro Americans [sic], and Hispanic  
5 origin at all levels staffing and management  
6 in proportion to each group's statistical and  
7 numeric representation in Fresno County,  
8 California as a remedy for past racial and  
9 ethnic discrimination by defendant ...; and

6 c) For Order prohibiting defendants ... and  
7 every person or business entity that employs  
8 or that is owned or controlled by any  
9 defendant(s) with knowledge of the Court's  
10 Order from applying for, cashing, or  
11 receiving any benefits, direct or indirect,  
12 from any federal, state, or local program(s)  
13 of any kind unless and until defendants (1)  
14 have made plaintiff whole of and from the  
15 injury, damage, and loss caused by  
16 defendant's discriminatory conduct in  
17 employment described in this pleading [sic];  
18 and (2) have proven to the satisfaction of  
19 this Court by a preponderance of the evidence  
20 that FOSTER FARMS DAIRY INC. has terminated  
its relationship of every kind with all  
persons who aided, abetted, facilitated, or  
engaged in the discriminatory acts complained  
of herein; (3) have proven to the  
satisfaction of this Court by a preponderance  
of the evidence that FOSTER FARMS DAIRY inc.  
has hire and promote qualified persons of  
female, African Americans, and Hispanic  
origin at all levels staffing and management  
within defendant FOSTER FARMS DAIRY INC. in  
proportion to each group's statistical and  
numeric representation in Fresno County,  
California as a remedy for past racial and  
ethnic discrimination by defendants ....

21 In addition to this injunctive relief, the FAC prays for  
22 compensatory, general and punitive damages, and for the Court "to  
23 set aside the general release".

24 The SAC filed on October 27, 2006, without prior leave of  
25 court, essentially alleges the same facts and causes of action  
26 set forth in the FAC. However, the SAC includes new causes of

1 action. The Fifth Cause of Action is for "wrongful termination  
2 in violation of the Federal False Claims Act" and the Sixth Cause  
3 of Action is for "wrongful termination in violation of the State  
4 False Claims Act". These causes of action are alleged against  
5 Foster Farms Dairy and Does 1-5, allege that these defendants had  
6 contracts or subcontracts to supply goods to the United States  
7 and the State of California; that these defendants violated the  
8 False Claims Acts by:

9 (A) They knowingly presented or caused to be  
10 presented to the United States [or the State  
11 of California] false or fraudulent claims for  
12 payment;

13 (B) They knowingly made, used, or caused to  
14 be made or used, a false record or statement  
15 to get a false or fraudulent claim paid or  
16 approved by the Government; or

17 (C) They knowingly made, used, or caused to  
18 be made or used, false records or statements  
19 to conceal, avoid, or decrease an obligation  
20 to pay or transmit money or property to the  
21 Government.

22 The Fifth and Sixth Causes of Action further allege that  
23 "Plaintiff was harassed, retaliated, discriminated against, and  
24 fired from his job in retaliation for his efforts to investigate  
25 the false claims described herein" in violation of 31 U.S.C. §  
26 3730(h) and California Government Code § 12653. The Seventh  
Cause of Action in the SAC is against Foster Farms Dairy and Does  
1-5 for "wrongful termination in violation of public policy" and  
alleges that Plaintiff's firing was in violation of the public  
policies of the Federal False Claims Act, the California False  
Claims Act, the California Fair Employment and Housing Act and 2

1 Cal.Code Regulations § 7287.8, and the Equal Opportunity Act, 29  
2 C.F.R. Pt. 1604.11, and EEOC Directives 915.003. The SAC prays  
3 for compensatory, general and punitive damages and injunctive  
4 relief with regard to the First through Fourth Causes of Action.  
5 With regard to the Fifth and Sixth Causes of Action, the SAC  
6 prays for "two times plaintiff's lost earnings", for compensatory  
7 damages, "including lost earning capacity, and medical and other  
8 expenses", general and punitive damages, for an "order  
9 reinstating plaintiff with full seniority, including seniority  
10 for the time he has lost". The Seventh Cause of Action prays for  
11 compensatory damages, "including lost income and lost earning  
12 capacity, and medical and other expenses", for general and  
13 punitive damages; for "Defendant verify answer"; and for  
14 "appropriate restitution be made because the CONSTITUTION DEMANDS  
15 it to be done".

16 The TAC filed on November 13, 2006, without prior leave of  
17 court, now alleges that Plaintiff brings this action for  
18 employment discrimination pursuant to Title VII and that  
19 plaintiff is acting as "relator ... on behalf of the United  
20 States of America and individually". The SAC also alleges that  
21 jurisdiction is based on 42 U.S.C. § 1981 and alleges with regard  
22 to jurisdiction and venue:

23 Plaintiff action seeks to remedy Defendant  
24 wrongful conduct through the following claims  
25 for relief: violations of Federal  
26 Whistleblowers Protection Act contained in 31  
U.S.C.A. Section 3730(h); violations of  
California Whistleblowers Protection Act;  
wrongful discharge ... in violation of public



1 policy; breach of implied and/or express  
2 contracts entered into by Defendant and  
3 Plaintiff; negligence; and punitive  
4 damages....

5 The TAC alleges essentially the same causes of action as alleged  
6 in the SAC with, for the most part, minor changes. For instance,  
7 the Second Cause of Action for Director's and Supervisor's  
8 Liability, the allegation that Defendants were on notice of  
9 racial discrimination and bigotry toward "African American race  
10 and his friends [sic] national origin" is now that Defendants  
11 were on notice of racial discrimination and bigotry toward  
12 "minorities". In the Third Cause of Action for Intentional  
13 Infliction of Emotional Distress, Plaintiff adds to the  
14 allegation that Defendants' conduct caused Plaintiff emotional  
15 and physical distress in his support of equal rights "and the  
16 support and safety concern of the public". The TAC also includes  
17 a new prayer for relief interspersed with the prayer for relief  
18 set forth in the SAC. The new prayer for relief prays for  
19 judgment:

20 a. Declaring the acts and practices  
21 complained of herein are in violation of the  
22 whistleblower protections contained in 31  
23 U.S.C.A. § 3730(h);

24 b. Enjoining and permanently restraining the  
25 violations of the whistleblower protections  
26 contained in 31 U.S.C.A. § 3730(h);

27 c. Directing Defendant to place Plaintiff in  
28 a position he would have held but for  
29 Defendant's discriminatory and retaliatory  
30 treatment of Plaintiff, and to make Plaintiff  
31 whole for all earnings and benefits he would  
32 have received but for Defendant's  
33 discriminatory and retaliatory treatment

1 including but not limited to wages (including  
2 front and back pay) and benefits and any and  
3 all other relief afforded under the  
whistleblower protections contained in 31  
U.S.C.A. § 3730(h);

4 d. Directing Defendant to pay Plaintiff  
5 general and compensatory damages in an amount  
to be proven at trial;

6 e. Directing Defendant to pay Plaintiff  
7 special compensatory damages including but  
8 not limited to actual and anticipated wage  
loss in an amount to be proven at trial;

9 f. Directing Defendant to pay the cost of  
this action together with costs and  
reasonable attorney's fees;

10 g. Declaring Defendant's acts against  
11 Plaintiff as willful, wanton, and malicious,  
and directing Defendant pay Plaintiff  
12 punitive damages in an amount to be proven at  
trial; and

13 h. Granting such other and further relief as  
14 this court deems proper.

15 i. Determine restitution in a manner thats  
16 [sic] appropriate and enter the appropriate  
restitution order.

17 j. Demand jury trial on all issues triable  
18 by jury.

19 The TAC also sets forth the prayer for relief alleged in the SAC.  
20 The only change is that the injunctive relief prayed for in  
21 connection with the Fourth Cause of Action includes "Native  
22 Americans" and "Asians" and includes "all appropriate counties  
23 where employed through Foster Farms".

24 However, although the First Cause of Action in the TAC  
25 continues to allege that Plaintiff was terminated in February  
26 2005 after Plaintiff was subpoenaed for a deposition in a

1 discrimination case against Foster Farms Dairy and disclosed "a  
2 few of the discriminatory action(s) of Foster Farms and 28 other  
3 related issues that Foster Farms did not want disclosed", the  
4 First Cause of Action includes some significantly different  
5 allegations from those set forth in the FAC or the SAC.

6 Specifically, the TAC alleges:

7 9. Plaintiff alleges that one or more of  
8 defendants' employment procedures, and or  
9 practice and or policies of each defendant  
has had a discriminatory effect and or impact  
upon him for the last fifteen years.

10 Plaintiff bases this conclusion, among  
11 others, on the findings written in the  
12 reports from investigations and conclusions  
13 written in reports upon completion of those  
14 investigations. [¶] Plaintiff also bases this  
15 conclusion on a foundation of facts that  
16 exist from documents, creating paper trail  
17 and or first hand knowledge and or real  
18 stories from real people with affidavits who  
19 have suffered harm from Dennis Bettencourt,  
20 Foster Farms Dairy and or Ron Foster and or  
21 real stories attached with affidavits from  
22 real people explaining how Dennis  
Bettancourt, Foster Farms Dairy and or Ron  
Foster violate federal law and or state law  
and our CONSTITUTION. One, of the many  
illegal on-going, re-occurring illegal  
subject matters existing within Foster  
operations is of PUBLIC concern. For  
economical gain Foster will disregard concern  
for the PUBLIC and violate laws protecting  
WE, THE PEOPLE. These 'evil ways' at Foster  
exist even though a percentage of the PUBLIC  
is harmed and even when our CONSTITUTION,  
Federal Law, and or State Las is being  
violated. Easily proven at TRIAL.

23 10. Plaintiff alleges that during his  
24 employment the following occurred frequently;  
25 subject to falsely accusing minorities,  
26 wrongfully disciplining minorities and even  
wrongfully terminating minorities and  
occasionally Teamsters Union Representative  
BOB QUINTANA and Foster Farms Human Resource

1 LUIS MIRANDA would be fully aware of the  
2 entire scheme and do nothing, for they have  
3 their own agenda and all shall be proven at  
4 trial. [¶] The latter part of [Plaintiff's]  
5 employment at the FOSTER FARMS DAIRY INC. he  
6 was subject to threats, racial comments,  
7 epithets and slurs at the workplace,  
8 including, but not limited to the following:  
9 'NIGGER LOVER' and 'Fuck You Tanto'.

10 Although Defendants decided not to challenge Plaintiff's  
11 failure to obtain prior permission to file the SAC and filed an  
12 Answer to the SAC, Defendants argue that the TAC should be  
13 stricken:

14 ... If Plaintiff's Third Amended Complaint is  
15 not stricken and Plaintiff is not reminded  
16 that he must follow the Federal Rules of  
17 Civil Procedure, he will continue filing  
18 amended complaints throughout the litigation  
19 as evidenced by Plaintiff filing [the TAC]  
20 just two weeks after filing [the SAC]. Such  
21 action confuses the issues and hinders the  
22 trial and litigation process. Proceeding  
23 with a clear operative complaint will  
24 streamline the ultimate resolution of the  
25 case.

26 Plaintiff's propensity for amending his  
complaint with trivial and non-substantive  
information also prejudices Defendants  
because they are required to incur the time  
and expense of filing amended answers  
virtually identical to prior responses. To  
the extent Plaintiff adds new facts or  
identifies new persons in his complaints that  
should have been included in the original or  
first amended complaint, such action also  
disrupts the discovery process - which is  
under way. Defendants will be prejudiced and  
deprived of the opportunity to present facts  
or evidence that they would have offered in  
defense if Plaintiff continues adding new  
information throughout the litigation.

Defendants' motion to strike is GRANTED. As noted, the  
Scheduling Order filed on October 23, 2006 stated that the

1 "parties do not anticipate filing any amendments to the pleadings  
2 at this time." Despite this representation, Plaintiff has twice  
3 filed amended pleadings. The Scheduling Order specifically  
4 provides:

5 XVI. Compliance With Federal Procedure.

6 1. The Court requires compliance  
7 with the Federal Rules of Civil Procedure and  
8 the Local Rules of Practice for the Eastern  
9 District of California. To aid the court in  
10 the efficient administration of this case,  
11 all counsel are directed to familiarize  
12 themselves with the Federal Rules of Civil  
13 Procedure and the Local Rules of Practice of  
14 the Eastern District of California, and keep  
15 abreast of any amendments thereto.

16 Even though Plaintiff is proceeding *in pro per*, he is required to  
17 familiarize himself and comply with the Federal Rules of Civil  
18 Procedure, the Local Rules of Practice for the Eastern District  
19 of California, and any court orders. Rule 83-183(a), Local Rules  
20 of Practice, provides in pertinent part:

21 Any individual representing himself ...  
22 without an attorney is bound by the Federal  
23 Rules of Civil ... Procedure and by these  
24 Local Rules. All obligations placed on  
25 'counsel' by these Local Rules apply to  
26 individuals appearing in propria persona.  
Failure to comply therewith may be ground for  
dismissal ... or any other sanction  
appropriate under these rules.

Rule 15(a) very clearly requires prior leave of court to file an  
amended complaint after the defendants file a responsive  
pleading, i.e., an Answer. Although discretion exists to allow  
this action to proceed under the TAC, discretion will not be so  
exercised here because of Plaintiff's repeated violation of Rule

1 15(a). Striking the TAC as inoperative and of no legal effect is  
2 necessary to compel Plaintiff's compliance with the Federal Rules  
3 of Civil Procedure and the Local Rules of Practice. If Plaintiff  
4 desires to proceed with the allegations set forth in the stricken  
5 TAC, Plaintiff must file a properly noticed and supported motion  
6 for leave to amend as required by these rules.

7 For the reasons set forth above, Defendants' motion to  
8 strike the Third Amended Complaint (Doc. 35) is GRANTED and the  
9 Third Amended Complaint (Doc. 34) is STRICKEN.

10 IT IS SO ORDERED.

11 **Dated: January 9, 2007**  
12 668554

**/s/ Oliver W. Wanger**  
UNITED STATES DISTRICT JUDGE